Supreme Court, U.S.
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NO. 02-1315

IN THE SUPREME COURT OF THE UNITED STATES

GARY LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, ET AL.,

Petitioners,

v.

JOSHUA DAVEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

1. Respondent Concedes There Is A Conflict Between The Washington Supreme Court And The Ninth Circuit

In the petition, we argued that review is necessary to resolve the conflict between the decision below and *Witters v. Washington Commission for the Blind*, 112 Wash. 2d 363, 771 P.2d 1119 (1989), *cert. denied sub nom. Witters v. Washington Department of Services for the Blind*, 493 U.S. 850 (1989) (*Witters* III). Pet. at 10-14. Respondent Davey concedes that there is a conflict. Br. Opp. at 7-8 ("The Ninth Circuit in this case held [that there was] a violation of [Davey's] right to the free exercise of religion. The Supreme Court of Washington, in *Witters* I and *Witters* III, essentially held the opposite."). Davey tries to down-play the significance of the conflict with two arguments based on speculation.

First, Davey speculates that the Washington Supreme Court will not adhere to its conclusion in *Witters* III that article I, section 11 of the Washington Constitution prohibits using public funds to pay for religious instruction. Br. Opp. at 5-7. There is no basis for this claim. In *State ex rel. Gallwey v. Grimm*, 146 Wash. 2d 445, 468, 48 P.3d 274, 285 (2002), the Washington Supreme Court's most recent decision involving article I, section 11, the court quoted with approval its earlier conclusion in *Witters v. Washington Commission for the Blind*,

102 Wash. 2d 624, 629, 689 P.2d 53 (1984)(*Witters* I) that it "is not the role of the State to pay for the religious education of future ministers". *Gallwey* upheld the program at issue in the case because the program's religious exclusion "provides that no student will be enrolled in any program that includes religious worship, exercise, or instruction". *Gallwey*, 146 Wash. 2d at 468, 48 P.3d at 285.

Second, Davey speculates that the Washington Supreme Court will apply subsequent decisions of this Court and reverse its decisions in *Witters* I and *Witters* III about the application of the Free Exercise Clause. Br. Opp. at 7-9. Davey relies on *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). Both these cases were decided before *Gallwey*, yet the *Gallwey* court did not apply them to overrule *Witters* I and *Witters* III. Moreover, *Smith* and *Lukumi* deal with laws that actually burden the practice of religion, as opposed to laws that decline to provide public funding of the exercise of a religious right. The application of these decisions to this case is not at all clear and that is an important reason why the Court should grant review. *See* section 2 *infra* page 3-4.

At bottom there is a conflict between the Washington Supreme Court and the Ninth Circuit. As a result, the law in Washington is unknown. Federal courts provide one answer, state courts

another. This is an intolerable situation that requires resolution by this Court.

It is also significant that the Ninth Circuit has essentially ruled that a provision of the Washington Constitution is unconstitutional. Article I, section 11 has been part of the Washington Constitution since statehood in 1889. This Court is the appropriate tribunal to decide whether a state constitutional provision violates the United States Constitution.

2. The Court Should Grant Review To Resolve Confusion About The Application Of Its Decisions

In the petition, we argued that the Ninth Circuit failed to properly apply this Court's decisions. Pet. at 15-18. Davey's response to this argument illustrates why it is important for the Court to grant review—there is confusion about how to apply the Court's decision.

There are three lines of authority. The first holds that the legislative decision not to fund the exercise of a constitutional right does not infringe on that right. *Maher v.* Roe, 432 U.S. 464 (1977). The second line deals with the application of the Free Exercise Clause to laws that actually burden the practice of religion. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). The third line holds that a limited public forum established by the government may not exclude religious speech that falls within the purpose of the

forum. *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819 (1995).

In our view—and that of the dissent in the case below—this case is controlled by *Maher*, the first line of authority. Davey has the right to pursue a degree in theology, but the Free Exercise Clause does not require the State to pay for his religious instruction. The second and third lines do not apply because the scholarship program does not infringe on Davey's ability to practice his religion or obtain a degree in theology and it does not establish a limited public forum for speech. Davey argues that the case should be resolved under *Lukumi* and *Rosenberger*—the second and third lines of authority. Br. Opp. at 8-10. But, Davey does not even discuss the first line of authority.

The majority in the decision below tangled the three lines of authority. Davey resolves the tangle by simply ignoring the first line. The Court should grant review to provide guidance about how these three lines of authority should be applied.

3. The Question Presented Has National Significance

In the petition, we argued that this case has national significance because 19 states have constitutional provisions that expressly prohibit using public funds to support religion and 14 states have statutes that prohibit using public funds to pay for a degree in theology. Pet. at 18, 22. Davey

responds that review is not warranted owing to the dubious motivation that gave rise to the Blaine Amendments. Br. Opp. at 15-16.

This argument misses the point. Whatever the motivation behind the adoption of these state constitutional provisions, the question presented in this case is national in scope—a point Davey does not dispute. Moreover, courts have enforced these stricter state constitutional provisions to strike down laws that would have been valid under the federal Establishment Clause—also, a point Davey does not dispute. Pet. at 18-21.

Courts have also rejected free exercise challenges to the application of these stricter state constitutional provisions. Pet. at 21-22. Davey does not dispute this point except to argue that *Luetkemeyer v. Kaufmann*, 364 F. Supp. 376 (W.D. Mo. 1973), *affirmed*, 419 U.S. 888 (1974), is distinguishable. Davey claims that *Luetkemeyer* upheld the state's refusal to provide bus transportation because "the state denied the benefit to students because they are enrolled in a nonpublic school . . . *not* because they were enrolled in a nonpublic *religious* school". Br. Opp. at 10.

This characterization of the court's reasoning is not accurate. One of the plaintiffs' claims in *Luetkemeyer* was that the constitution "requires that all services, specifically, bus transportation, which the State may decide to furnish public school pupils

must also be furnished parochial school pupils". *Luetkemeyer*, 364 F. Supp. 384. The court ruled that the state constitutional provision that prohibited paying for bus transportation for students attending religious schools did not violate the Free Exercise Clause. According to *Luetkemeyer*, the "Supreme Court has clearly indicated that there is an area of activity which falls between the Establishment Clause and the Free Exercise Clause in which action by a State will not violate the former, nor inaction, the latter". *Luetkemeyer*, 364 F. Supp. at 386. The holding in *Luetkemeyer* is at odds with the decision below. Under the majority's reasoning in the decision below there is no such area between the Establishment Clause and the Free Exercise Clause.

This is an important national question that requires this Court's review.

4. This Case Is A Good Candidate For Review

Davey argues that this case is a poor candidate for review. Br. Opp. at 16-18. Davey claims that the restriction on the scholarship program prohibits the declaration of a religious major rather than the use of public funds to pay for religious instruction. Davey sets out several hypothetical applications of the restriction which he labels as arbitrary. This argument is not well taken because it is based on speculation rather than the facts of this case. In this case, Davey was ineligible

for the scholarship because he was pursuing a degree in theology—that is a degree that inherently includes religious education. Davey made it clear in his deposition that he was pursuing a degree in theology and that he understood what that meant in the context of the curriculum at Northwest College.[1]

The Washington Constitution and applicable statutes prohibit the state from paying for Davey's religious instruction. The straightforward question presented is whether the Free Exercise Clause requires Washington to fund Davey's religious instruction when it provides scholarships for secular

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[1] Q At that time, did you dispute whether the pastoral studies major was pursuing a degree in theology, as that applies to the Promise Scholarship?

A [Davey:] No, I did not dispute that.

Q Do you dispute that at this time?

A [Davey:] No, I don't.

. . . .

Q Did you have any difficulty coming to that general understanding of what pursuing a degree in theology meant to you?

A [Davey:] No. From my understanding of what the State would consider to be church related or theology related and looking at what Northwest's program entailed, I felt that I understood what the State was getting at by saying that program wouldn't be covered by the scholarship

Dep. Davey at 33-34, ER at 38:19, 20.

instruction. The Court should grant review to resolve this question.

5. Conclusion

For the foregoing reasons and the reasons stated in the petition, the writ of certiorari should be granted.

Respectfully submitted.

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